

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ORLANDO KEITH CASH,

Defendant-Appellant.

UNPUBLISHED

September 29, 2005

No. 254493

Wayne Circuit Court

LC No. 03-012091-01

Before: Bandstra, P.J., and Neff and Donofrio, JJ.

PER CURIAM.

Defendant appeals as of right from his convictions by a jury of assault with a dangerous weapon (felonious assault), MCL 75.82, possession of a firearm during the commission of a felony, MCL 750.227b, and being a felon in possession of a firearm, MCL 750.224f. The trial court sentenced defendant to concurrent terms of one year's probation, with the first thirty days to be served in the Wayne County Jail, for the felonious assault and felon in possession convictions. Consecutive to this sentence, defendant received the mandatory two-year prison term for the felony-firearm conviction. We affirm.

The charges in the instant case arose from a confrontation between defendant and his former girlfriend, Amy Milks. In March of 2002, Milks arrived home to find her dog missing. Believing defendant had taken the animal, she went to confront him accompanied by her mother, Jeanie Parker Rhodes, and her stepfather, Norman Rhodes. After defendant denied having any knowledge of the dog, they discovered it locked in his car a short distance from his home. They contacted the police, but before the authorities could arrive, the three complainants allege that defendant confronted them carrying what appeared to be a sawed-off .22 caliber rifle. They further asserted that he fired several shots, ordered them away from the vehicle, and drove off with the dog.

On appeal, defendant contends that the trial court's actions in allowing testimony linking defendant to other bad acts involving the same complainant were prejudicial, denied him his right to due process, and require reversal of his convictions. Specifically, defendant argues that the trial court erred in admitting testimony from Milks stating that other items, in addition to her dog, were missing from her home. And defendant claims the trial court committed reversible error when it allowed the prosecution to question Milks regarding a 1997 incident that resulted in defendant being convicted for assaulting Milks.

At trial, defendant objected to the admission of testimony regarding his prior felony conviction on the ground that it might prejudice the jury. He therefore preserved the issue for appeal. But rather than objecting to the admission of testimony concerning items missing from Milks' home on the grounds it constituted bad acts evidence, defendant objected based on relevance. In order to preserve an evidentiary issue for review, a party must object to the evidence at trial on the same grounds that it asserts on appeal. *People v Aldrich*, 246 Mich App 101, 113; 631 NW2d 67 (2001). Consequently, defendant failed to preserve the issue as it relates to the missing items.

We generally review a trial court's decision to admit evidence for an abuse of discretion. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999). "An abuse of discretion involves far more than a difference of opinion." *People v Hine*, 467 Mich 242, 250; 650 NW2d 659 (2002). Rather, it occurs when a result is so palpably and grossly violative of fact and logic that it evidences not the exercise of will but perversity of will, not the exercise of judgment but the defiance of it. *Id.*

However, we may only review unpreserved claims of evidentiary error for plain error affecting a defendant's substantial rights. *People v Coy*, 258 Mich App 1, 12; 669 NW2d 831 (2003). Reversal is warranted only if a plain error resulted in the conviction of an actually innocent defendant or when an error seriously affected the fairness, integrity, or public reputation of the judicial proceedings independent of the defendant's innocence. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

Use of bad acts as evidence of character is prohibited, except as allowed by MRE 404(b), to avoid the danger of conviction based on a defendant's history of misconduct. *People v Starr*, 457 Mich 490, 495; 577 NW2d 673 (1998). MRE 404(b) provides:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case.

In *People v VanderVliet*, 444 Mich 52, 55; 508 NW2d 114 (1993), modified 445 Mich 1205; 520 NW2d 338 (1994), the Michigan Supreme Court stated that before a trial court may admit evidence of other bad acts, it must determine:

First, that the evidence be offered for a proper purpose under Rule 404(b); second, that it be relevant under Rule 402 as enforced through Rule 104(b); third, that the probative value of the evidence is not substantially outweighed by unfair prejudice; fourth, that the trial court may, upon request, provide a limiting instruction to the jury.

Regarding defendant's first claim on appeal, the trial court allowed Milks to testify, that, in addition to her dog, a VCR and possibly a computer were missing from her home on the ground that it constituted "background." Defendant contends that this was not permissible under MRE 404(b) because the rule does not list "background" as a proper purpose for which other acts evidence may be used. He further asserts that because he was not charged with theft, the evidence was not relevant and thus, more prejudicial than probative.

Although MRE 404(b) provides examples of permissible uses of other acts evidence, the list is not exhaustive. *People v Watson*, 245 Mich App 572, 576-577; 629 NW2d 411 (2001). Contrary to defendant's assertions, the rule permits the admission of evidence for any relevant purpose that "does not risk impermissible inferences of character to conduct." *Id.* at 576, quoting *Starr, supra* at 496. Rather than admitting Milks' testimony to establish defendant's propensity to commit theft, the trial court allowed her testimony regarding the missing dog and other items to explain why she went to defendant's home. The evidence was relevant to show why the confrontation between defendant and the complainants occurred and to establish that defendant may have had a motive for assaulting them, i.e., it provided context. *People v Daoust*, 228 Mich App 1, 13; 557 NW2d 179 (1998). Because the relevance of this "background" information outweighed any possibility of unfair prejudice to defendant, the trial court did not err in admitting it. Consequently, no plain error occurred and we decline to further review the issue.

Defendant's second claim on appeal must also fail. The evidence concerning his prior felony conviction meets the criteria for admission of other acts evidence set forth in *VanderVliet*. Rather than being offered as improper character evidence, the prosecution elicited the testimony to further explain the relationship between defendant and Milks' parents. In response to a series of questions by defense counsel, Milks testified that her mother and stepfather used to like defendant, but that attitude towards him changed after she and defendant had "problems." Based on this testimony, the trial court allowed the prosecution to question Milks regarding the reason for the change and Milks testified regarding the 1997 assault. This testimony was relevant to the issue of whether two of the complainants were biased against defendant. And the trial court instructed the jury to only consider the evidence as it related to defendant's relationship with Milks' parents.

Nevertheless, defendant argues that the danger of unfair prejudice presented by this evidence outweighed any probative value it possessed. A jury might consider evidence that defendant assaulted Milks in the past to be proof of his guilt in the instant case. But the evidence was equally probative of the fact that, because of their dislike for him, Milks' mother and stepfather had a motive to fabricate the allegations against defendant, an issue of their credibility, always a relevant matter. *People v Mills*, 450 Mich 61, 72; 537 NW2d 909 (1995), mod 450 Mich 1212; 539 NW2d 504 (1995). Based on the record presented, we do not find that the prejudicial effect of the testimony regarding defendant's earlier conviction substantially outweighed its probative value. Thus, the trial court did not abuse its discretion by admitting the evidence.

Further, even if the trial court had abused its discretion in allowing the testimony, any such error was harmless. Under MCL 769.26, "a preserved, nonconstitutional error is not a ground for reversal unless 'after an examination of the entire cause, it shall affirmatively appear' that it is more probable than not that the error was outcome determinative." *Lukity, supra* at 496. In the instant case, the evidence in question showed that defendant had previously assaulted

Milks. If this evidence had been improperly considered as showing defendant's propensity to commit assault, the jury would have likely found it highly probative of a propensity to assault Milks. But the jury acquitted defendant of the charges that he assaulted both Milks and her stepfather. His convictions all stem from the allegations that he assaulted Milks' mother. Consequently, defendant cannot establish that it is more probable than not that a different outcome would have resulted had the trial court excluded the testimony concerning his prior conviction.

Affirmed.

/s/ Richard A. Bandstra

/s/ Janet T. Neff

/s/ Pat M. Donofrio